

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 26, 2006

**STATE OF TENNESSEE v. MICHEIL ELLSWORTH SHEPPARD AKA
MICHAEL E. SHEPPARD**

**Direct Appeal from the Criminal Court for Wilson County
No. 04-0618 J.O. Bond, Judge**

No. M2005-02816-CCA-R3-CD - Filed on February 1, 2007

The defendant, Micheil Ellsworth Sheppard, was convicted of one count of especially aggravated kidnapping, one count of aggravated robbery, one count of theft by possession, and three counts of aggravated rape. He received a total effective sentence of 120 years. On appeal, the defendant raises the following issues: (1) whether the trial court erred in denying his motion to strike certain jurors for cause; (2) whether the evidence was sufficient to support one of his convictions of aggravated rape; and (3) whether the trial court imposed a disproportionate and unduly harsh sentence. Following our review, we affirm the defendant's convictions and sentences.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

William K. Cather (at trial and on appeal) and Shelly Thompson (at trial), Assistant Public Defenders, Lebanon, Tennessee, for the appellant, Micheil Ellsworth Sheppard aka Michael E. Sheppard.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Tom P. Thompson, District Attorney General; and Howard L. Chambers, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The following evidence was presented at trial. Betty Hand, the victim, testified that on July 6, 2004, she was working at the "Linwood BP," a convenience store and gas station off of Interstate 40 in Wilson County, Tennessee. Around 9:00 p.m., the defendant entered the BP and started a conversation with the victim. After flashing a badge, the defendant told the victim he was with the

"Narcotics Division" and was investigating a female who had come into the BP. Later, while the victim was preparing to close the BP, the defendant came into the cashier's cage with a gun and demanded money. Upon hearing the defendant's demand, the victim opened the cash register and removed the money. The defendant then told the victim to accompany him. As they stepped outside the BP, the defendant held a gun to the victim's back and said he would kill her if she made noise. The defendant then forced the victim into the passenger side of a vehicle parked outside of the BP parking lot.

The victim testified that the defendant drove west on I-40, exited at Highway 109 and eventually turned off onto Callis Road. During the trip, the defendant kept the gun in "his lap." The defendant ended up driving the vehicle through a barbed wire fence and into a drainage ditch behind a barn where the vehicle became stuck. At this time, the defendant told the victim, "we'll just wait here." The defendant then pulled out a beer and told the victim to drink it. The victim took a few sips and poured the rest out the window. The defendant became angry and gave the victim another beer and took a beer for himself. Again, the victim poured out the beer when the defendant was not looking.

The victim testified that after drinking a few beers, the defendant told her to take her shirt off. The victim indicated that she did not want to. In response, the defendant told the victim, "[w]e'll do this the easy way or we can do it the hard way." So, the victim took off her shirt. The defendant then told her to take off her bra. After she complied, he rubbed her breasts with his gun.

The victim testified that she became nauseated and got out of the vehicle because she thought she was going to vomit. The defendant then walked over to the passenger side and assured her that she would be okay. The victim got back in the vehicle, but sat in the passenger seat with her legs dangling out of the vehicle. The defendant then ordered her to remove her pants, and although she begged the defendant not to, he raped her. During the rape, the victim became nauseated, and after the defendant got off of her, she started to vomit. The defendant got a towel and proceeded to wipe the sweat and vomit from the victim's face. The defendant then laid the towel on the ground "to finish raping [her]." After which, the defendant apologized, telling the victim that raping her "was the worst thing he could have ever done."

The victim testified that after a few unsuccessful attempts to free the defendant's vehicle from the ditch, she and the defendant proceeded to walk into the woods. After walking for some time, they came upon a barn. The defendant told the victim he would let her go but only after he took her clothes and scattered them. According to the victim, the defendant did not let her go at this time, but rather, he raped her a third time in the barn. After the rape, the defendant apologized again and told the victim that he would let her go, but she was to stay in the barn for an hour. The defendant gave her his watch and walked out of the barn. However, the defendant re-entered the barn after hearing a helicopter fly overhead. The defendant then grabbed the victim and took her back into the woods. The victim recalled that the defendant dragged her around the woods, hiding from the helicopters all afternoon.

The victim testified that eventually she got tired of hiding in the woods and told the defendant that he was going to have to let her go or shoot her. The defendant responded by telling her that he would let her go and he would turn himself in. The two of them walked out of the woods onto a highway where they eventually encountered a state trooper. The defendant was taken into custody without further incident.

On cross-examination, the victim clarified her earlier testimony and stated that the defendant raped her three times. She said she thought the time “at the truck was only one rape because near the time that I’m in the passenger’s seat and he’s raping me, I don’t think he finished his job, so, therefore he got on the ground, and I didn’t realize that penetration . . . is rape. He doesn’t have to ejaculate for it to be rape, so, therefore, it was three times.” When asked how much time lapsed between sitting in the passenger seat and lying on the towel, the victim responded saying it was long enough for her to just be sick again and for him to hold her hair up, wipe her face, and spread the towel.

Detective Ricky Knight testified that on July 6, 2004, he and other police officers responded to a call regarding an armed robbery and kidnapping at the Linwood BP. Upon arrival at the BP, they discovered that the clerk and money were missing. The BP’s surveillance tape was retrieved and reviewed. The surveillance tape was entered into evidence and reviewed by the jury. After talking to witnesses, the police officers got a description of a gray Nissan Xterra with a partial license plate number of “480.” The license plate was also described as portraying the Smoky Mountains with yellow and purple colors. After talking with the witnesses, a Be-On-The-Look Out (BOLO) was issued for the Xterra.

Detective Knight testified that the Nissan Xterra was found the following morning in a ditch on Callis Road. The Xterra had a license plate number of “6NP480” and portrayed the Smoky Mountains. Upon investigation, Detective Knight observed that no one was inside the Xterra and the vehicle was locked. Detective Knight and other police officers then proceeded to search for the defendant and the victim. Later in the afternoon, the defendant and victim were found. The defendant was taken into custody and the victim was transported to a hospital. Detective Knight stated that a Colt .38, a silver star badge, a bank bag, and \$3,838.51 consisting of cash, coins, and checks – were recovered. Later, a sample of the defendant’s saliva was taken and sent to the Tennessee Bureau of Investigation (TBI) for analysis.

Michelle Madell testified that she was an employee at the Linwood BP. On July 6, around 9:30 p.m., she observed the defendant holding a gun to the victim’s stomach. She also saw the defendant take money out of the cash register. After making these observations, she drove off and called the police. She recalled that she provided police with the description of the defendant’s vehicle. Several other police officers and witnesses testified as to the events surrounding the search and discovery of the defendant and the victim.

Special Agent Charles Hardy, a TBI forensic scientist, testified that he was provided with the victim's rape kit. After analyzing the vaginal swabs from the kit, Agent Hardy found that the sperm isolated on the vaginal swabs matched the defendant's DNA profile.

The defendant testified in his own defense. He recounted that he left home in North Carolina due to financial and marital difficulties, and he started to drink and do drugs. As he put it, he "got kind of crazy and started doing some crazy things." He stated he went to the Linwood BP because he wanted someone to talk to. He said, "I did not go in [BP] with any intentions of hurting anybody or robbing that store. Things just happened. But I did do it."

The defendant testified that at some point after talking with the victim, he left the store, retrieved a gun, and went back inside. He then told the victim to give him the money. The defendant admitted to asking the victim for money, but he denied pointing the gun at the victim. He further denied rubbing his gun on the victim's breasts. The defendant recalled that after his vehicle got stuck in the ditch, he and the victim sat in the car for hours, talking, laughing, drinking, and smoking. The defendant stated that he and the victim had sex and afterward the victim complimented him and "[they] drank some more, smoked some more, [and] laughed some more." Later on, when the two of them were in the barn, he and the victim had sex again. As the defendant recalled, the victim complimented him again, telling him "it was better that time than it was the first time." After leaving the barn, he and the victim went to a field and smoked until they heard helicopters and people. The defendant said the victim protected him a couple of times when she pushed him down and told him to be quiet.

The defendant testified that when the victim testified, "[s]he told the truth . . . and a lot of things she said I done, I did, too." He further asserted that he would not lie to anybody about what he did because he wanted "nothing to stand between [him] and God." According to the defendant, he had thought the victim was a friend and cared for him. He believed that the victim thought he was a nice guy, was sympathetic to his plight, and did not want him to get caught. He recalled the victim telling him that she would go out with him once he got his life straightened out. The victim also told him that "if she was going to be kidnaped, she couldn't be kidnaped by a better person."

The defendant asserted that he never once threatened the victim or forced her to do anything against her will. He denied forcing the victim to leave the BP store or threatening her life, however, he conceded that the victim probably felt threatened because he had a gun. He admitted to robbing the store, but he denied raping the victim. On cross-examination, he admitted to using a gun to force the victim into his vehicle, then driving away. When asked whether or not he remembered if he told the victim to take off her clothes, the defendant responded, "I may have." When asked if the victim's caring attitude toward him was an act of survival, the defendant responded, "That's a possibility, sir." The defendant admitted to carrying the gun and money as he and the victim were wandering in the woods. The defendant asserted that the victim "didn't appear to be scared to death." He acknowledged, however, that the victim might have been scared in the beginning but that was "the only time [the victim] was ever scared."

Based on the evidence presented, the jury found the defendant guilty of one count of especially aggravated kidnapping, one count of aggravated robbery, one count of theft by possession, and three counts of aggravated rape. Following a sentencing hearing, the trial court merged the defendant's theft conviction with his aggravated robbery conviction. The court then sentenced the defendant to twenty years for his aggravated robbery conviction, twenty-five years for his especially aggravated kidnapping conviction, and twenty-five years for each aggravated rape conviction. The court ordered each conviction to be served consecutively for a total effective sentence of 120 years.

ANALYSIS

I.

The defendant first argues that the trial court erred by denying seven of his eight motions to excuse potential jurors for cause. In essence, the defendant complains that the trial court's denial forced him to exercise five of his peremptory challenges thereby limiting his ability to remove three other jurors. The state responds that the defendant's trial was not prejudiced because the challenged jurors were not seated on the jury and the defendant was not forced to accept an incompetent jury.

Initially, we note that a trial court has wide discretion in ruling on the qualifications of jurors. *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989). Moreover, unless there has been clear abuse, the trial court's discretion in determining the qualifications of jurors is not subject to review. *Lindsey v. State*, 225 S.W.2d 533, 538 (Tenn. 1949). A trial court's finding of impartiality may be overturned only for manifest error. *Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *State v. Howell*, 868 S.W.2d 238, 248 (Tenn. 1993).

The failure to challenge for cause or the failure to use any available peremptory challenge to remove objectionable jurors precludes reliance upon the alleged disqualifications of jurors on appeal. *See State v. Thacker*, 164 S.W.3d 208, 238 (Tenn. 2005). A criminal defendant must not only exhaust his peremptory challenges but must also challenge or offer to challenge any additional prospective juror believed to be objectionable in order to complain on appeal that the trial court's decision in refusing to excuse the prospective juror resulted in a biased jury. *See State v. Doelman*, 620 S.W.2d 96, 100 (Tenn. Crim. App. 1981); *see also* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). Before a defendant can claim error in the trial court's failure to remove a potential juror for cause, the defendant must have exercised a peremptory challenge to remove the juror, and exhausted all peremptory challenges. *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). It is only where a defendant exhausts all peremptory challenges and is thereafter forced to accept an incompetent juror can a complaint about the jury selection process have merit. *Howell*, 868 S.W.2d at 248.

In the instant case, the court denied seven of the defendant's eight motions to excuse potential jurors for cause. These potential jurors were challenged because they were exposed to

pretrial publicity, had relatives in law enforcement, or had relatives who had been the victims of sex crimes. However, the defendant only exercised peremptory challenges against five of the seven prospective jurors challenged for cause and the other two were never impaneled as jurors. As such, none of the prospective jurors challenged for cause were on the jury. Moreover, it is clear from the record that the defendant never challenged any of the impaneled jurors he now alleges to be objectionable. Consequently, the defendant has not proven that he was denied the constitutional right to a trial by a fair and impartial jury. This issue is without merit.

II.

The defendant next challenges the sufficiency of the evidence as to one of his convictions for aggravated rape.¹ Specifically, the defendant contends that the trial court erred in denying his motion for judgment of acquittal as to one of his three counts of rape because the state only proved two incidents of sexual penetration and not three. The defendant asserts that his convictions are multiplicitous, and the court's failure to grant his motion violates constitutional prohibitions against double jeopardy.

Initially, we note that "[t]he standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction." *State v. Thompson*, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000); *see also State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998). Therefore, we address the defendant's argument under a sufficiency of the evidence standard of review.

It is well-established that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *Id.*

¹ The defendant does not challenge the sufficiency of the evidence for his other convictions.

Because the defendant's challenge to his aggravated rape conviction encompasses the constitutional principles of double jeopardy and multiplicity, we set forth the following explanation. "Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense." *State v. Phillips*, 924 S.W.2d 662, 665 (Tenn. 1996). Multiple convictions for the same offense violate both federal and state constitutional prohibitions against double jeopardy. See U.S. Const. amend. V; Tenn. Const. art. I, § 10. In determining whether a defendant has received multiple punishments for the same offense, a court should consider the following principles:

1. A single offense may not be divided into separate parts; generally, a single wrongful act may not furnish the basis for more than one criminal prosecution;
2. If each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and
3. Where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act.

Phillips, 924 S.W.2d at 665 (footnotes omitted). "Additional factors such as the nature of the act; the time elapsed between the alleged conduct; the intent of the accused, i.e., was a new intent formed; and cumulative punishment may be considered for guidance in determining whether the multiple convictions violate double jeopardy." *State v. Epps*, 989 S.W.2d 742, 745 (Tenn. Crim. App. 1998).

Relevant to this case, aggravated rape is the unlawful sexual penetration of a victim by the defendant where force or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon. Tenn. Code Ann. § 39-13-502(a). "Sexual penetration" includes sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body, and emission of semen is not required. *Id.* § 39-13-501(7). "Although separate acts of intercourse may be so related to amount to one criminal offense, rape is generally not considered one continuous offense; rather, each act of intercourse is a separate and distinct offense." *State v. Reginol L. Waters*, No. M2001-02682-CCA-R3-CD, 2003 WL 213777, at *11 (Tenn. Crim. App., at Nashville, Jan. 30, 2003) (affirming two aggravated rape convictions where acts of sexual penetration occurred approximately five minutes apart). An accused may be convicted of more than one offense when the rape involves separate acts of sexual penetration. See *Phillips*, 924 S.W.2d at 662 (holding three discrete acts of sexual penetration supported three aggravated rape convictions).

After examining the record and applicable law, we conclude the defendant committed three separate and distinct offenses of aggravated rape. The record reflects that the first rape occurred when the defendant penetrated the victim while she was sitting in the passenger seat. The first rape was terminated when the victim became nauseated and began to vomit. The defendant got a towel,

wiped the victim's face with it, then laid the towel on the ground. Thereafter, the second rape occurred when the defendant penetrated the victim while she was lying on the ground. The third rape occurred sometime later in a barn. Significantly, each rape is distinguishable by the time and location, and shows the defendant's separate and renewed intent to seek sexual gratification or inflict abuse. *See id.* We therefore conclude that the evidence was sufficient to support the defendant's convictions for aggravated rape, and these convictions do not violate the prohibition against double jeopardy. The defendant is not entitled to relief on this issue.

III.

The defendant next challenges the length and manner of service of his sentences, complaining that his sentences are unduly harsh and disproportionate. The defendant was sentenced as a standard offender to twenty-five years for his especially aggravated kidnapping conviction, and twenty-five years for each of his three aggravated rape convictions. He was sentenced as a multiple offender to twenty years for his aggravated robbery conviction. His convictions were ordered to run consecutively to each other and to a previously imposed federal sentence. In consequence, the defendant received a total effective sentence of 120 years to be served consecutively to a previously imposed federal sentence.

When an accused challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f).

Before a trial court sentences a convicted defendant, it must consider: (1) the evidence received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the arguments of counsel relative to sentencing alternatives; (5) the nature and characteristics of the criminal conduct involved; (6) any mitigating or enhancement factors; (7) any statements made by the defendant in his or her own behalf; and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103, -210; *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is also required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the

method by which the mitigating and enhancement factors have been evaluated in determining the sentence. *Imfeld*, 70 S.W.3d at 704-05.

Sentence Length

In challenging his sentences, the defendant first contends that the trial court improperly enhanced his sentences. The defendant specifically submits that the trial court improperly applied enhancement factors: (3), (5), (7), (9), and (10). The defendant argues that due to the court's error in its application of several enhancement factors, the maximum sentence on each of his convictions is not justified.

Especially aggravated kidnapping and aggravated rape are Class A felonies. Tenn. Code Ann. §§ 39-13-305(b)(1), -502(b). The sentencing range for a Range I, standard offender who commits a Class A felony is fifteen to twenty-five years. *Id.* § 40-35-112(a)(1). Aggravated robbery is a Class B felony. *Id.* § 39-13-402(b). The sentencing range for a Range II, multiple offender who commits a Class B felony is twelve to twenty years. *Id.* § 40-35-112(b)(2). Starting with the minimum in the range, the trial court should adjust the sentence length within the range as appropriate based upon the presence or absence of mitigating and enhancement factors set out in sections 40-35-113 and 40-35-114. *Id.* § 40-35-210(c). The weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the statutory sentencing guidelines and its findings are adequately supported by the record. *See State v. Souder*, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002).

In the instant case, the court found no mitigating factors, then found the following enhancement factors present:

- (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- (3) The offense involved more than one victim;
- (5) The defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense;
- (7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;
- (8) The defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;
- (9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense;

(10) The defendant had no hesitation about committing a crime when the risk to human life was high;

(13) The felony was committed while the defendant was on parole; and

(17) The crime was committed under circumstances which the potential for bodily injury to the victim was great.

See Tenn. Code Ann § 40-35-114. The court also found the fact that “[t]hese felonies resulted in psychological damage” was an aggravating factor.

We first note that the trial court did not clearly articulate the specific grounds and weight upon which it applied most of the enhancement factors. Nevertheless, our de novo review of the record leads us to affirm the court’s enhancement of the defendant’s sentences. With regard to factor (1), the record reflects that the defendant had a previous history of criminal convictions including robbery, sexual battery, rape, and kidnapping. With regard to factor (13), the record, albeit sparse, reflects that the defendant received a split confinement sentence of ten years for sexual battery in 1978, then committed rape in 1987 and received a fifty year sentence in 1989. After serving thirteen years of his rape sentence, he was paroled and committed a federal kidnapping offense in June of 2004 for which he ultimately received a sentence of life imprisonment. Shortly after committing the federal kidnapping offense, he committed the present offenses. As such, the record supports the trial court’s application of these factors.

With regard to factor (7), the record reflects that prior to raping the victim, the defendant ordered the victim to drink beer with him. He then ordered the victim to take off her shirt, telling her, “[w]e’ll do this the easy way or we can do it the hard way.” He then ordered her to take off her bra and proceeded to touch her breasts with his gun. Despite the victim’s pleas not to, the defendant raped her inside the vehicle, stopped after she started to vomit, then raped her again on the ground after he cleaned her up. Later on, the defendant promised the victim she would be released after she took off her clothes and scattered them around the barn. However, the defendant did not let her go and raped her instead. Finally, the defendant made comments at trial indicating he believed the victim enjoyed being raped. He also asserted at sentencing that he was a “sex addict.” Our supreme court has held that this enhancement factor “may be applied with evidence including, but not limited to, sexually explicit remarks and overt sexual displays made by the defendant, such as fondling or kissing a victim or otherwise behaving in a sexual manner, or remarks or behavior demonstrating the defendant’s enjoyment of the sheer violence of the rape.” *Arnett*, 49 S.W.3d at 262. The record supports a finding that the rapes were committed to gratify the defendant’s desire for pleasure or excitement. Accordingly, we find no error in the court’s application of this factor.

The applicability of enhancement factors (3), (5), (8), (9), (10), the “great bodily injury” factor, and the “psychological damage” factor is more problematic for a number of reasons including the fact that these factors may not be applicable because they are inherent within the offenses for which the defendant was convicted or not supported by law or evidence. *See Imfeld*, 70 S.W.3d at

705-06; *Arnett*, 49 S.W.3d at 258-64; *State v. Spratt*, 31 S.W.3d 587, 607 (Tenn. Crim. App. 2000); *State v. Nix*, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995); *State v. Kern*, 909 S.W.2d 5 (Tenn. Crim. App. 1993). Nonetheless, even if it was error for the trial court to consider these enhancement factors, the record supports application of enhancement factors (1), (7), and (13). Based on our de novo review, we conclude that the presence of three enhancement factors and no mitigating factors is sufficient to support the defendant's enhanced sentences. See *State v. Gomez*, 163 S.W.3d 632, 659 (Tenn. 2005) (upon the finding of even one enhancement factor, the "statute affords to the judge discretion to choose an appropriate sentence anywhere within the statutory range"). Accordingly, the defendant is not entitled to relief on this issue.

Consecutive Sentencing

The defendant next contends that the trial court erred in imposing consecutive sentences. We disagree.

A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. Therefore, pursuant to this code section, a trial court may impose consecutive sentencing if it determines any one of the following criteria applies:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). The criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. However, if the trial court imposes consecutive sentencing based solely upon a finding that the defendant is a dangerous offender, the court must also determine whether the sentences imposed are reasonably related to the severity of the offenses and necessary to protect the public from further criminal activity by the defendant. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). Additionally, the trial court should consider general sentencing principles including whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See Imfeld*, 70 S.W.3d at 708. It is within the sound discretion of the trial court whether or not to impose consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

In imposing consecutive sentences, the trial court found the following:

Looking at the prior record, this Defendant is a danger to any person, especially ladies, [who] are out on the street, that is, females, children, and never needs to be where he could be in a position to ever do this again.

....

The sentence that's rendered here today will be consecutive to any federal time that he received in the federal jurisdiction, and he was convicted of more than one crime. The Court, looking at consecutive sentencing or concurrent sentencing, under the law, there must be one of the following factors present, and there's four factors listed under the law: Factor Number 2, the Defendant was an offender whose record for criminal activities is extensive.

Well, it is extensive when you look at the type of crimes that he's committed, but it goes on further to say, or the Defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation by committing a crime in which the risk to human life is high.

Then . . . the Defendant committed this offense while on parole from a felony which makes it mandatory consecutive.

In doing this sentence, the Court, of course, looks to the rights of society. Society has a right to be protected from a criminal such as this. Confinement is necessary to protect society against this Defendant, because of this Defendant's history of prior . . . conduct.

Confinement is necessary to appreciate the seriousness of this offense and confinement is necessary to deter other people from doing this type of thing . . .

He's had measures less restrictive [than] confinement. His record would indicate that during his life.

In our view, these findings reflect that the trial court considered the sentencing principles and all relevant facts and circumstances required for the imposition of consecutive sentences. Here, the record clearly supports the court's finding of extensive criminal history. Also, the defendant's presentence report coupled by his own admissions indicate that the defendant committed these offenses while on parole for a prior felony, and thus, his sentences were mandatorily consecutive. *See* Tenn. R. Crim. P. 32(c)(3)(A). Furthermore, the defendant's prior record consisting of violent offenses of rape and kidnapping coupled with the defendant's behavior in committing the aforementioned offenses support a finding the defendant is a danger to society, and the consecutive sentences imposed reasonably relate to seriousness of the offenses and are necessary to protect the public from further criminal activity by the defendant. Accordingly, the defendant is not entitled to relief on this issue.

CONCLUSION

Following our review of the record and the parties' briefs, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE